

A **BANK OF COMMERCE (M) BHD**

v.

LIM KESANG & ORS

B HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL SUIT NO: 22-279-1999]
8 NOVEMBER 2005

C **CIVIL PROCEDURE:** *Striking out - Writ and statement of claim - Grounds for - Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c) or (d) - Whether claim had reasonable cause of action - Whether frivolous or vexatious*

D **CIVIL PROCEDURE:** *Pleadings - Striking out writ and statement of claim - Appearance - Entry of unconditional appearance - Whether defendants precluded from making an application after filing of unconditional appearance*

E This was an application by way of summons in chambers (encl. 22) filed by the third and fourth defendants ('D3 and D4') to strike out the plaintiff's writ and statement of claim under, *inter alia*, O. 18 r. 19(1)(a), (b), (c) or (d) of the Rules of the High Court 1980 ('RHC'). The facts were that on 13 September 1999, the plaintiff filed the writ and statement of claim ('the writ').

F Subsequently, on 5 October 1999, D3 and D4 entered unconditional appearance and submitted that defence was to be filed upon obtaining documents from the bank *ie*, the plaintiff. On 31 May 2000, solicitors for D3 and D4 requested for 'vital documents and answers to particulars and documents which were left out' and claimed that there was no reply thereto. On 5 March 2004, the plaintiff filed a notice to proceed which was served on D3 and D4. D3 and D4 embarked on an averment of facts which should have been pleaded in their defence. However, the defence was nowhere to be found herein as D3 and D4 have filed no defence. The issues that arose were (1) whether the entry of an unconditional appearance precluded a defendant from filing an application under O. 18 r. 19 of the RHC; (2) whether plaintiff had occasioned a deliberate and inordinate delay of some eight years and four months from the date of the alleged termination of the guarantee by D3 and D4 on 12 June 1996 to 18 October 2004 which was the date when the vital documents were supplied;

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(3) whether the plaintiff had reasonable cause of action and (4) whether the plaintiff's pleaded claim was wholly frivolous or vexatious. A

Held (dismissing encl. 22):

[1] In light of the judgment of *Alor Janggis Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors*, the court held that by filing an unconditional appearance, D3 and D4 have deprived themselves of the right to invoke O. 18 r. 19 of the RHC and so the instant application failed in *limine*. Further, the inordinate delay had been occasioned by D3 and D4 with the consequence that no defence had been filed on or before 19 October 1999 which was the date prescribed for that purpose. (pp 25 A & 26 H-I) B C

[2] D3 and D4 have stressed that they have resigned as directors of Far East United Sdn Bhd and that had resulted in the termination of the guarantee executed by them. However, D3 and D4 have filed no defence whatsoever, in which case the issues of their discharge as guarantors and resignation as directors were non-issues. Such issues could only be considered if they have been pleaded in the defence, as the parties were clearly bound by their pleadings. (p 27 B & H) D E

[3] Upon a true construction of the plaintiff's statement of claim, it was clear that the plaintiff had a reasonable cause of action against D3 and D4 on the basis of the guarantee. The factual situation as averred in the plaintiff's statement of claim came within the definition of a cause of action or more specifically a reasonable cause of action. Hence the ground relied on by D3 and D4 under O. 18 r. 19(1)(a) could not be sustained. (p 28 B & E) F G

[4] The plaintiff's claim in the instant suit was against, *inter alia*, D3 and D4 as parties who were alleged to have played a role in the execution of the guarantee. In the circumstances, the court was unable to hold that the pleaded claim was wholly unnecessary or irrelevant, neither could it be said to be frivolous or vexatious in the sense of being obviously unsustainable. The plaintiff herein had a legitimate right to initiate and pursue his pleaded claim to seek relief against D3 and D4 as guarantors. (pp 28 H-I & 29 C-D) H I

A Case(s) referred to:

Abdul Jalal Ahmad & Ors v. Pegawai Pemegang Harta Cawangan Negeri Sembilan & Ors [2004] 7 CLJ 293 HC (**refd**)

Abdul Rahim v. Perdana Merchant Bankers [2000] 2 CLJ 457 CA (**refd**)

Akitek Bersatu v. Sempurna Cekap Sdn Bhd [2004] 7 CLJ 217 HC (**refd**)

B *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461 SC (**refd**)

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 3 MLJ 36 (**refd**)

Boey Oi Leng v. Trans Resources Corporation Sdn Bhd [2002] 1 CLJ 405 HC (**refd**)

C *Chan Min Swee v. Melawangi Sdn Bhd* [2000] 7 CLJ 1 HC (**refd**)

Chartered Bank v. Yong Chan [1974] 1 MLJ 157 (**refd**)

Chung Khiaw Bank Ltd v. Soi Huan & Ors [1986] 1 MLJ 188 (**refd**)

Credit Corporation (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC (**refd**)

D *Dato' Hari Menon Ramakrishnan v. Texas Encore LLC & Ors* [2005] 2 CLJ 688 HC (**refd**)

Datuk Ir Che Amran Mohd Yusoff v. Yayasan Melaka & Ors [2003] 1 CLJ 767 HC (**refd**)

Fu Yen Development Sdn Bhd v. Shelly Yap Leong & Co [2001] 3 CLJ 946 HC (**refd**)

E *Honan Plantations Sdn Bhd v. Kerajaan Negeri Johor & Anor* [1998] 3 CLJ 253 CA (**refd**)

Janagi v. Ong Boon Kiat [1971] 2 MLJ 196 (**refd**)

Letang v. Cooper [1965] 1 QB 222 (**refd**)

Lim Kean v. Choo Koon [1970] 1 MLJ 158 (**refd**)

F *Lim Seak Huat v. Malayan United Realty Sdn Bhd* [1997] 5 CLJ 336 HC (**refd**)

Mooney & Ors v. Peat, Marwick, Mitchell & Co & Anor [1967] 1 MLJ 87 (**refd**)

N Carrupaiya v. MBf Property Services Sdn Bhd & Anor [2000] 4 CLJ 116 HC (**refd**)

G *Nasri v. Mesah* [1971] 1 MLJ 32 (**refd**)

New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 MLJ 226 (**refd**)

Newacres Sdn Bhd v. Sri Alam Sdn Bhd [1991] 3 MLJ 474 (**refd**)

Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors [1999] 2 CLJ 886 HC (**refd**)

H *Re Orr-Ewing* 22 Ch 463 (**refd**)

Roslan Abdullah v. New Zealand Insurance Co Ltd [1981] 2 MLJ 324 (**refd**)

S Manickam & Ors v. Ismail Mohamed & Ors [1997] 2 MLJ 90 (**refd**)

Saw Gaik Beow v. Cheong Yew Weng & Ors [1989] 3 MLJ 301 (**refd**)

I *Seng Huat Hang Sdn Bhd & Ors v. Chee Seng & Co Sdn Bhd* [1987] 1 MLJ 413 (**refd**)

Sheldon v. Brown Bayley's Steel Works Ltd & Dawnways Ltd [1953] 2 QB 393 (**refd**)

Legislation referred to:

Rules of the High Court 1980, O. 18 rr. 2(1), 12(3), (4), (7), 19(1)(a),
(b), (c), (d), (2), O. 33 rr. 2, 3

For the plaintiff - Kee Tiong Kiak; M/s Chee Siah Le Kee & Partners

For the 3rd & 4th defendants - Thara Singh Sidhu; M/s Thara Singh Sidhu

Reported by Suhainah Wahiduddin

JUDGMENT**Low Hop Bing J:****Application**

This is an application by way of summons in chambers in encl. (22) filed by the third and fourth defendants ("D3 and D4") for numerous prayers which run into some four pages. In essence, these prayers seek the striking out of the plaintiff's writ and statement of claim under, *inter alia*, O. 18 r. 19(1)(a), (b), (c) or (d) of the Rules of the High Court 1980; or alternatively leave for D3 and D4 to file their defence and counterclaim within one month from the date of the order.

Factual Background

Enclosure (21) is the affidavit in support of the application in encl (22) and was affirmed by D3 who was also authorised to affirm it on behalf of D4. It has set out, *inter alia*, the chronology of events. I shall only refer to the factual background relevant to this application.

On 13 September 1999, the plaintiff filed this writ and statement of claim ("the writ").

D3 and D4 entered unconditional appearance on 5 October 1999. The appearance was served on the plaintiff's solicitors on the same date.

D3 and D4 said that defence was to be filed upon obtaining documents from the bank ie, the plaintiff.

On 26 and 27 November 1999, solicitors for D3 and D4 wrote to plaintiff's solicitors requesting for documents and information in order to file their defence.

A Solicitors for D3 and D4 claimed that on 25 May 2000, they had received from the plaintiff's solicitors "only a bare minimum of documents".

B On 31 May 2000, solicitors for D3 and D4 wrote to plaintiff's solicitors requesting for "vital documents and answers to particulars and documents which were left out" and claimed that there was no reply thereto.

C On 5 March 2004, *vide* encl. (12), plaintiff filed a notice to proceed which was served on the solicitors for D3 and D4.

D On 8 June 2004, solicitors for D3 and D4 received a letter dated 3 June 2004 from the plaintiff's solicitors informing them that this action has been fixed for mention on 22 June 2004 and gave them seven day's notice to file their defence, failing which judgment in default would be entered against them.

The "vital documents" sought by D3 and D4 had apparently been supplied by the plaintiff's solicitors on 18 October 2004.

E The above chronology was expressed in not less than two pages of the affidavit in support. However, in six subsequent pages, D3 and D4 appeared to have embarked on averment of facts which should have been pleaded in their defence. However, the defence is nowhere to be found herein as D3 and D4 have filed no defence whatsoever.

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Entry Of Unconditional Appearance

It was submitted by learned counsel Mr. Kee Tong Kiak that having filed their unconditional appearance on 4 October 1999, it is now too late for D3 and D4 to file this application under O. 18 r. 19 as they are precluded from doing so, citing:

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1. *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461 SC;

H 2. *Lim Seak Huat v. Malayan United Realty Sdn Bhd* [1997] 5 CLJ 336 HC;

3. *Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors* [1999] 2 CLJ 886 HC; and

I 4. *Abdul Jalal Ahmad & Ors v. Pegawai Pemegang Harta Cawangan Negeri Sembilan & Ors* [2004] 7 CLJ 293 HC.

Learned counsel Mr. Thara Singh Sidhu responded that D3 and D4 had on 27 November 1999 requested for documents from the plaintiff and were only supplied on 18 October 2004, some four years and 11 months later, and so the entry of an unconditional appearance should not be a bar to their application under O. 18 r. 19, referring to *Akitek Bersatu v. Sempurna Cekap Sdn Bhd* [2004] 7 CLJ 217 HC. A B

In my judgment, it is to be noted that there seems to be some divergence of judicial opinions on the question as to whether the entry of an unconditional appearance precludes a defendant from filing an application under O. 18 r. 19. C

In *Akitek Bersatu, supra*, the defendant had filed an unconditional appearance and subsequently filed an application to strike out the plaintiff's claim under O. 18 r. 19. One of the issues for determination was whether the defendant was precluded from doing so. Mohd Hishamudin bin Mohd Yunus J referred to *N Carrupaiya v. MBf Property Services Sdn Bhd & Anor* [2000] 4 CLJ 116 HC, where the same learned judge held as follows: D

In my judgment, the filing of an unconditional appearance does not preclude a defendant from making an application under Order 18 r. 19. I find nothing in the RHC providing, either explicitly or impliedly, to that effect. On the contrary, Order 18 r. 19 expressly provides that such an application may be made at any stage of the proceeding. The words "at any stage of the proceedings", to my mind, strongly imply that the right to make an application under Order 18 r. 19 is not conditional upon the filing of a conditional appearance. Such an application may be made, for example, after the filing of the statement of defence; or, even after the pleadings are deemed to be closed. E F

His Lordship also referred to *Chan Min Swee v. Melawangi Sdn Bhd* [2000] 7 CLJ 1 where Abdul Malik Ishak J ruled that a defendant is not precluded from making an application under O. 18 r. 19 merely by reason of the fact that he had filed an unconditional appearance and observed: G H

I must emphasis the phrase "at any stage of the proceedings" and it must necessarily mean that a party can make the application at any time up to the close of pleadings, and in special circumstances, even after the close of pleadings (see the speech of Zakaria Yatim J (as he then was) in *Bank Bumiputra Malaysia Bhd & Anor v. Lorrain Esme Osman and Another Action* [1987] 2 MLJ 633 particularly at p 635 of the report). Now, since a party can generally make the application at any time up to the close of I

A pleadings stage, this must necessarily mean after filing an unconditional appearance or a conditional appearance which has become unconditional ...

B Mohd Hishamudin J also referred to *Fu Yen Development Sdn Bhd (suing as a firm) v. Shelly Yap Leong & Co (sued as a firm)* [2001] 3 CLJ 946 where Richard Malanjum J (now FCJ), in dealing with a similar issue as well as the case of *Alor Janggus, supra*, J said:

C As for the contention that the respondent should not have applied under Order 18 r. 19 of the rules since there was no conditional appearance entered, with respect I think the reply of learned counsel for the respondent answered it in that conditional appearance should only be entered if the objections were within any of the following, namely:

- D (i) the defective writ;
(ii) irregularity of service of the writ; or
(iii) jurisdiction.

E The main objection in this case did not fall within any of those categories.

With the utmost respect, there are other authorities that do not subscribe to the view expressed by the learned judges in the aforesaid three High Court judgments.

F In *Alor Janggus, supra*, the plaintiffs by their statement of claim instituted the civil suit on the basis of a cause of action in contract and tort, and that was amplified by the affidavit of the second plaintiff, affirmed on 3 June 1993. The defendants have filed their unconditional appearance. In the High Court and in the
G then Supreme Court, the respective learned counsel for the defendant company and another individual defendant raised the *locus standi* of the plaintiffs to bring the action as their preliminary objection and that the plaintiffs had no cause of action against the defendant company.

H Jemuri Serjan CJ (Borneo) (as he then was) delivered judgment for the then Supreme Court. On the matter of procedure, the learned CJ observed as follows:

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Procedure

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The question that immediately comes to our minds is if the defendants are sure in their own minds that the plaintiffs have no *locus standi* or cause of action why did they not invoke O. 18 r. 19 or O. 33 r. 2 of the Rules of the High Court 1980 (“the RHC”) because if they succeed in their applications on any of these orders the civil suit and the injunction itself would both collapse. We would demonstrate why invocation of O. 18 r. 19 or O. 33 r. 2 is the correct procedure by reference to authorities.

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The learned CJ proceeded to deal with the authorities and O. 18 r. 19 with unrivalled scholarly learning and concluded with the following words:

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It was open to the defendants to resort to O. 18 r. 19 or O. 33 r. 2 of our RHC but they chose not to do so but to bring up the *locus standi* issue on their application to set aside the injunction. On this ground alone, this appeal should succeed. It is too late now for the defendants to invoke O. 18 r. 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke O. 18 r. 19 but it is still open to them to have recourse to O. 33 r. 2 if they are so minded. ...

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In my view, in relation to the issue under consideration in *Alor Janggis, supra*, in which I have had the privilege of appearing as counsel for the plaintiffs-appellants, there can be no doubt about the ratio of the Supreme Court as set out in the judgment of the learned CJ and reproduced above, which is legally binding on me in the court of first instance.

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On the same issue, *Alor Janggis, supra*, has been followed eg, in

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1. *Lim Seak Huat, supra*, where at p. 357d-e Abdul Malik Ishak J added that the effect of an unconditional appearance is said to be a waiver of any irregularity there may be and an entire submission to the jurisdiction of the court (*Sheldon v. Brown Bayley's Steel Works Ltd & Dawnways Ltd* [1953] 2 QB 393; [1953] 2 All ER 894 CA; and *Re Orr-Ewing* 22 Ch 463);
2. *Pet Far Eastern, supra*, at pp. 586I to 587A per Abdul Malik Ishak J;
3. *Abdul Jalal Ahmad, supra*, at p. 303d by me; and
4. *Dato' Hari Menon a/l Ramakrishnan v. Texas Encore LLC & Ors* [2005] 2 CLJ 688 by me.

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A In the light of the weighty judgment of the then Supreme Court in *Alor Janggis, supra*, I hold that by filing an unconditional appearance, D3 and D4 have deprived themselves of the right to invoke O. 18 r. 19 and so the instant application would fail in limine.

B Be that as it may, I shall proceed to consider the merits of this application.

Delay

C D3 and D4 contended, *inter alia*, that they were not involved with Far East United Sdn Bhd (“D6”) after 1996 and when they received the plaintiff’s writ in October 1999, it was absolutely necessary to obtain “vital documents” to study the whole case in order to decide whether to apply to strike out the claim or to file their defence and that as they received only some documents but not the “vital documents”, their solicitors could not proceed further. They added that the plaintiffs had occasioned a deliberate and inordinate delay of some eight years and four months from the date of the alleged termination of the guarantee by D3 and D4 on 12 June 1996 to 18 October 2004 which is the date when the vital documents were supplied. They contended they were exonerated from the guarantee, besides attributing to the plaintiff *mala fide*, which they claim constitutes estoppel, acquiescence, waiver and laches.

F The plaintiff submitted, *inter alia*, that no inordinate delay had been occasioned by the plaintiff as D3 and D4 have not filed their defence and so pleadings have not closed.

G In my view, upon entry of the appearance by D3 and D4 on 5 October 1999, if they had intended to defend the action, they must avail themselves of the provisions under O. 18 r. 2(1) which where relevant reads:

H ... a defendant who enters an appearance in, and intends to defend, an action must, unless the Court gives leave to the contrary, serve a defence on the plaintiff before the expiration of 14 days after the time limited for appearing or after the statement of claim is served on him, whichever is the later.

I Hence, it is incumbent upon D3 and D4 to serve their defence on the plaintiff on or before 19 October 1999 ie, not later than 14 days after they have entered appearance on 5 October 1999.

There has been no submission that the plaintiff's statement of claim has been so defectively or inadequately pleaded. Had that been the case, so as to be lacking in particulars, or to cause difficulty to D3 and D4 to file their defence, it would have been open to them to ask for further and better particulars under O. 18 r. 12(3), (4) and (7) which were relevant merit reproduction as follows:

12. Particulars of pleading (O. 18 r. 12)

(3) The Court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or in any affidavit of his ordered to stand as a pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the Court thinks just.

(4) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of a paragraph (3), the Court may, on such terms as it thinks just, order that party to serve on any other party:

(a) where he alleges knowledge, particulars of the facts on which he relies; and

(b) where he alleges notice, particulars of the notice.

(5) ...

(6) ...

(7) The particulars requested or ordered and supplied must be served in accordance with Form 35.

Much has been said of the plaintiff's supply of some of the documents, and of the plaintiff's refusal to supply "vital documents" to D3 and D4 pursuant to the letters from the solicitors for D3 and D4 to the plaintiff's solicitors. However, instead of invoking O. 18 r. 2(1) to file their defence within the time prescribed for that purpose, or alternatively to apply for further and better particulars under O. 18 r. 12(3), (4) and (7), they have elected to take no procedural steps in court, but had instead attributed inordinate delay to the plaintiff. In my view, the true position reveals that the inordinate delay had been occasioned by D3 and D4 with the consequence that no defence has been filed on or before 19 October 1999 which was the date prescribed for that purpose.

- A In the circumstances, I am unable to sustain the submission presented for D3 and D4.

Reasonable Cause Of Action

- B D3 and D4 stressed that they have resigned as directors of Far East United Sdn Bhd and that has resulted in the termination of the guarantee executed by them.

The plaintiff relied on O. 18 r. 19(1)(a) and added that the statement of claim has disclosed a reasonable cause of action.

- C In considering this ground under O. 18 r. 19(1)(a), I shall only confine myself to the plaintiff's pleadings and disregard the affidavits, as O. 18 r. 19(2) expressly provides that no evidence shall be admissible on this application.

- D The test to be applied is whether on the face of the pleading, the court is prepared to say that the cause of action is obviously unsustainable: per Mohamed Azmi FJ in *New Straits Times (Malaysia) Bhd. v. Kumpulan Kertas Niaga Sdn. Bhd. & Anor.* [1985] 1 MLJ 226 FC at pp. 227I rt to 228A left.

- E So long as the statement of claim discloses a reasonable cause of action, however weak the claim is, the claim cannot be struck out summarily. At that stage of the proceedings, it is not for the appellate court or the court of first instance to consider the merits of the claim: per Mokhtar Sidin JCA in *Abdul Rahim v. Perdana Merchant Bankers* [2000] 2 CLJ 457 CA at p. 465 b-c.

- F A proper perusal of the statement of claim reveals that at para 9, the guarantee was pleaded. Default by the borrower was pleaded in para 18. Further, para 21 averred that demand has made on D3 and D4.

- G On the other hand, D3 and D4 has filed no defence whatsoever, in which case the issues of their discharge as guarantors and resignation as directors are non-issues. Such issues can only be considered if they have been pleaded in the defence, as the parties are clearly bound by their pleadings: see eg, *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196 HC; and *Chartered Bank v. Yong Chan* [1974] 1 MLJ 157.

- H Be that as it may, it is to be noted that in *Chung Khiaw Bank Ltd. v. Soi Huan & Ors.* [1986] 1 MLJ 188, the same submission was raised that the moment the defendants resigned their directorships on 28 June 1982, they automatically ceased to be

liable on the guarantees they had executed. Shankar J at p. 191 held that the “argument is so bizarre, that it is not worth a moment’s consideration.”

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In my judgment, upon a true construction of the plaintiff’s statement of claim, it is abundantly clear to me that plaintiff has a reasonable cause of action against D3 and D4 on the basis of the guarantee.

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In *Letang v. Cooper* [1965] 1 QB 222, at 242 Diplock LJ explained that a cause of action means “simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person”. (See also *Lim Kean v. Choo Koon* [1970] 1 MLJ 158; *Nasri v. Mesah* [1971] 1 MLJ 32 FC; *Saw Gaik Beow v. Cheong Yew Weng & Ors* [1989] 3 MLJ 301; *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 MLJ 474 SC; and *Credit Corporation (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 cited in *Malaysian High Court Practice* 1998 Edn. MLJ Vol. 1 p. 331):

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The factual situation as averred in the plaintiff’s statement of claim adumbrated above does in my view come within the definition of a cause of action or more specifically a reasonable cause of action. Hence, the ground relied on by D3 and D4 under O. 18 r. 19(1)(a) cannot be sustained.

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Scandalous, Frivolous Or Vexatious

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There was no submission by D3 and D4 in relation to O. 18 r. 19(1)(b) that the plaintiff’s claim is scandalous, frivolous or vexatious. However, since it was cited by them in their application, for purposes of completeness, I shall consider it.

In the context of O. 18 r. 19(1)(b), the word “scandalous” means wholly unnecessary or irrelevant: see eg, *Boey Oi Leng v. Trans Resources Corporation Sdn Bhd* [2002] 1 CLJ 405; and *Datuk Ir. Che Amran Mohd Yusoff v. Yayasan Melaka & Ors* [2003] 1 CLJ 767.

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The plaintiff’s claim in the instant suit is against, *inter alia*, D3 and D4 as parties who were alleged to have played a role in the execution of the guarantee. In the circumstances, I am unable to hold that the pleaded claim is wholly unnecessary or irrelevant, neither can it be said to be frivolous or vexatious in the sense of

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- A being obviously unsustainable eg, where the wrong party is being sued, or the action is without merit or not justified: see *Boey Oi Leng, supra*, and *Datuk Ir. Che Amran, supra*.

Prejudice, Embarrass Or Delay Fair Trial

- B Again, there was no submission presented for D3 and D4 under O. 18 r. 19(1)(c).

On the factual background adumbrated above, I am of the view that D3 and D4 have failed to establish this ground.

- C **Abuse Of Process Of Court**

Regarding this ground under O. 18 r. 19(1)(d), there can be no doubt in my mind that the plaintiff in the instant suit has a legitimate right to initiate and pursue his pleaded claim to seek relief against D3 and D4 as guarantors.

- D **Principles Governing O. 18 r. 19**

These principles have been set out in a long line of authorities. In a nutshell, it is only in conspicuously unsustainable cases that a pleading generally and a claim specifically would be struck out under any limb of O. 18 r. 19(1) and such power would only be exercised by the court sparingly: see eg, *Roslan bin Abdullah v. New Zealand Insurance Co. Ltd.* [1981] 2 MLJ 324 FC; *Datuk Ir. Che Amran, supra*; *Seng Huat Hang Sdn. Bhd. & Ors. v. Chee Seng & Co. Sdn. Bhd.* [1987] 1 MLJ 413 HC; *Mooney & Ors. v. Peat, Marwick, Mitchell & Co. & Anor.* [1967] 1 MLJ 87 HC; *Honan Plantations Sdn Bhd v. Kerajaan Negeri Johor & Anor* [1998] 3 CLJ 253 CA; *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 SC; *S Manickam & Ors v. Ismail bin Mohamed & Ors* [1997] 2 MLJ 90.

- G **Conclusion**

Learned counsel for D3 and D4 has done his competent best. However, with the utmost respect, the procedural steps taken or omitted for D3 and D4 are in my view unorthodox and extraordinary. I am unable to find any merits in the application by D3 and D4 in encl. (22) to strike out the plaintiff's claim or for extension of time to file the defence. I therefore dismiss it with costs.

- I